

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

Pending before the Court is Mr. Carrasco's Motion to Vacate, Set Aside, or Correct Sentence under § 2255 (ECF No. 681) and Motion for Reconsideration and/or in the Alternative Petitioner's Motion to Withdraw his Motion . . . (ECF No. 684). Mr. Carrasco filed a § 2255 Motion alleging "(1) Petitioner's counsel was ineffective for failing to file a notice of appeal despite Petitioner requesting him to do so; and (2) The Court erred by accepting Petitioner's plea because the taking of the plea did not comport with Fed. R. Crim. P. 11, and defense counsel was ineffective by failing to raise the issue." ECF No. 684. The Court issued an order putting Mr. Carrasco on notice that part or all of his allegations, if the Court granted his Motion, could cause him to lose the benefit of his Plea Agreement. Mr. Carrasco filed the Motion for Reconsideration under the mistaken understanding that the Court had ruled. The Court understands that Mr. Carrasco does not wish to pursue claims that would be considered a breach of the Plea Agreement. The Court does not wish to rule prior to briefing, so instead requests that the Government respond to Mr. Carrasco's § 2255 Motion only on those issues which would not void Mr. Carrasco's Plea Agreement.

ORDER - 1

1 Only if the Motion, file and records "conclusively show that the movant is entitled to
2 no relief" may the Court summarily dismiss the Motion without sending it to the United States
3 Attorney for response. 28 U.S.C. § 2255 (West). The Rules Regarding Section 2255
4 Proceedings similarly state that the Court may summarily order dismissal of a 2255 motion
5 without service upon the United States Attorney only "if it plainly appears from the face of
6 the motion and any annexed exhibits and the prior proceedings in the case that the movant is
7 not entitled to relief in the district court." Rule 4(b), RULES--SECTION 2255 PROCEEDINGS
8 (West). Thus when a movant fails to state a claim upon which relief can be granted or when
9 the motion is incredible or patently frivolous, the district court may summarily dismiss the
10 motion. Cf. *United States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989); *Marrow v. United*
11 *States*, 772 F.2d 525, 526 (9th Cir. 1985). The Court has reviewed the file and the Motion
12 and the Court cannot say that the Motion is patently frivolous. Accordingly,

13 **IT IS ORDERED** that:

14 1. Notice shall be served upon the United States to answer Mr. Carrasco's § 2255
15 Motion by **August 10, 2012**. The contents of the answer shall conform to the requirements
16 of Rule 5(b) of the Rules-Section 2255 Proceedings.

17 2. Mr. Carrasco shall serve and file a reply to United States answer, if any, **within**
18 **thirty (30) days of service** of the United States' answer.

19 3. If Mr. Carrasco raises new issues in his reply, the Government may respond to
20 those issues in a supplemental response to be filed and served within 20 days of service of the
21 Mr. Carrasco's reply.

22 4. The Court will take the matter under advisement when the briefing is complete.

23 5. Mr. Carrasco shall serve upon the United States Attorney a copy of every further
24 pleading or document submitted for consideration by the Court. He shall include with the
25 original paper to be filed with the District Court Executive, a certificate stating the date a true
26 and correct copy of any document was mailed to the United States. Mr. Carrasco shall also

1 supply to the District Court Executive a copy for the Judge of all filings. Local Rule 5.1(a).
2 Any paper received by a District Court Judge which has not been filed with the District Court
3 Executive or which fails to include a certificate of service will be disregarded by the Court.
4 Mr. Carrasco is also advised that throughout this action he must notify the District Court
5 Executive regarding any change of address.

6 6. Mr. Carrasco's Motion for Reconsideration, filed July 2, 2012, **ECF No. 684**, is
7 **DENIED with the right to renew**. If upon the Government's response, Mr. Carrasco would
8 like to withdraw any of this claims, he shall file a motion making that request. The Court will
9 permit Mr. Carrasco to withdrawn his claims upon the Government's response if he so
10 desires.

11 The District Court Executive is directed to:

- 12 • File this Order,
13 • Send a copies to counsel **AND TO** Mr. Carrasco; and
14 • Provide the United States Attorney with a copy of the § 2255 Motion.

15 **DATED** this 12th day of July, 2012.

16
17 07-11-12

s/ Wm. Fremming Nielsen
WM. FREMMING NIELSEN
SENIOR UNITED STATES DISTRICT JUDGE